BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: RII Plastering, Inc. dba Quality Plastering 104 Maple Street Corona, CA 92880-1704 Employer	Docket No. 02-R3D1-2679 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by RII Plastering, Inc. dba Quality Plastering (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning January 18, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at 13073 Weeping Willow Court, Corona, California.

On May 28, 2002, the Division cited Employer for four alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1] Employer filed a timely appeal contesting the existence and classifications of the alleged violations as well as the reasonableness of the abatement requirements and civil penalties.

A hearing was held on September 24, 2004 before an Administrative Law Judge (ALJ) for the Board, and the matter was submitted on September 29, 2004. The ALJ rendered the decision on October 28, 2004, upheld two of the four violations, and assessed total civil penalties of $1,375.[2] These two violations, both of which were classified as general, were from section 1509(a)

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.
[2] The ALJ granted the appeals from the two violations not subject to this petition for reconsideration.

[failure to maintain an effective Injury and Illness Prevention Program] and section 1621((a) [failure to provide guard rails on elevated work surface][3].

On December 2, 2004, Employer filed a petition for reconsideration of the ALJ's decision regarding these two violations. The Division filed an answer to Employer's petition on January 5, 2005.

EVIDENCE

The Division conducted an accident investigation after a worker was found injured on the first floor of a home under construction below an elevated platform. As part of its investigation, the Division issued a document request that sought a copy of Employer's "Injury and Illness Prevention Plan – the narrative." In response, Employer provided the table of contents for the IIPP, but did not provide the plan itself. Employer testified that it thought the table of contents was "the narrative" and believed production of the table of contents was sufficient. The Division sent a subsequent document request, but did not request the rest of the IIPP. The resulting citation alleged that Employer did not have an effective IIPP. The citation noted that Employer only submitted the table of contents for the IIPP, which failed to contain all the required elements of an IIPP. At the hearing, Employer introduced its full IIPP. The ALJ reviewed the document, concluded it was missing required content, and upheld the citation.

The ALJ also found sufficient circumstantial evidence to conclude that the injured worker fell over 7½ feet from an elevated platform that lacked the guardrails required by section 1621(a). The evidence consisted of photographs of the work location taken by Employer and the Division as well as statements the Division's inspector attributed to Employer's foreman and Employer's third-party safety representative.

At the hearing, Employer objected to the comments attributed to its foreman, Rosas, and its safety representative, McCoy. The foreman was precluded from testifying at the hearing because his ability to speak English was limited and an appropriate interpreter was not requested or available. Employer objected that the statements attributed to Rosas and McCoy were hearsay. Employer further objected that the Division could not demonstrate which comments were made by Rosas, and which were made by McCoy, because McCoy helped translate Rosas' interview with the Division. The ALJ found that the statements attributed to Rosas were admissible because they constituted party admissions. She further noted that any statements made by McCoy would fall under the same hearsay exception. She also observed that

[3] Section 1621(a) states, in relevant part, "Unless otherwise protected, railings as set forth in Section 1620 shall be provided along all unprotected and open sides, edges and ends of all built-up scaffolds, runways, ramps, rolling scaffolds, elevated platforms, surfaces, wall openings, or other elevations 7 1/2 feet or more above the ground, floor, or level underneath."

both men were in the room during the hearing and could have challenged the comments the Division attributed to them, if they wished.

ISSUES

1. Did the ALJ properly uphold the section 1509(a) violation?
2. Did the ALJ properly uphold the section 1621(a) violation?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Employer was properly found to be in violation of section 1509(a).

In its petition for reconsideration, Employer contended that the citation for the section 1509(a) violation was invalid on its face because it was based on Employer's IIPP's table of contents only, which may or may not reflect the contents of the actual IIPP. Employer maintained that, even if the Division had proved the table of contents lacked necessary aspects of an IIPP, this would not constitute a violation of section 1509(a) because the safety order refers to the content of an IIPP and not the content of the table of contents. In addition, Employer asserted that the ALJ improperly shifted the burden of proof on this citation, because she found that *Employer* failed to show that its IIPP complied with section 1509(a). Employer alleges that the Division presented insufficient evidence of a deficiency in its IIPP to justify a shift in the burden of proof.

Employer's petition misconstrues the citation. The charging language in the citation alleges that Employer failed to maintain an effective IIPP. The Division reached this conclusion by considering the only information available to it, specifically the table of contents. Employer chose to provide it no more. Given the deficiencies in the table of contents, and Employer's decision not to provide the Division with the actual plan, it was reasonable for the Division to conclude that Employer either only maintained a table of contents, which does not constitute an effective IIPP, or that the plan itself was inadequate. We find that the citation was facially valid.[4]

Had Employer not introduced its IIPP into evidence at the hearing, the Division's evidence might have proved insufficient to sustain the violation. Nonetheless, once the IIPP was introduced by Employer to demonstrate its compliance with the regulation, the ALJ was entitled to consider it to determine

[4] We reject any argument that it was incumbent upon the Division to issue a follow-up request for further IIPP documentation. We believe the Division's document request was clear and Employer's decision to provide a less than complete response was undertaken at its peril. Indeed, given Employer's minimalist response to the document request for training records, as discussed below, as well as the IIPP, a reasonable inference could be made that Employer deliberately withheld responsive documents. Such tactics are misguided and should not be rewarded.

if a violation of section 1509(a) occurred. Irrespective of which party introduces a piece of evidence, the ALJ may consider it in reaching a decision. *Williams v. Barnett* (1955) 135 Cal App 2d 607, 612; *Best Roofing & Waterproofing*, Cal/OSHA App. 01-2695, Decision After Reconsideration (Mar. 17, 2003); see also, *JD[2], Inc.*, Cal/OSHA App. 02-2693, Decision After Reconsideration (Aug. 16, 2004). The Board has repeatedly stated that, "'Preponderance of evidence' is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." *Harbor Sand & Gravel, Inc.,* Cal/OSHA App. 01-1016, Decision After Reconsideration (June 5, 2003), citing, *Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001). Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence, including that produced by the defendant. *Best Roofing & Waterproofing, supra; Lone Pine Nurseries, supra.*

When the ALJ evaluated the IIPP introduced by Employer, she found it lacking and upheld the violation. The ALJ considered an appeal from a separate alleged violation in the same fashion and granted the appeal. Specifically, the Division's document request solicited the injured employee's training documents. Employer chose to provide a summary of his training, but did not specify that the document was a summary. Based on the document provided, the Division appropriately alleged a separate 1509(a) violation for failure to properly maintain training records. At the hearing, Employer produced the actual training records and the ALJ found they complied with the regulatory requirements. The ALJ granted the appeal because the evidence provided by Employer at hearing demonstrated compliance. In contrast, the evidence adduced at hearing pertaining to the contents of the IIPP demonstrated non-compliance with the safety order, so the citation was upheld. We concur with the ALJ's decision to uphold the IIPP violation.

2. The ALJ properly upheld the section 1621(a) violation.

Regarding the section 1621(a) violation, Employer renews allegations made at the hearing in which it maintained that the statements attributed by the Division to its foreman, Rosas, and its safety representative, McCoy, were improperly considered. Employer contends that the statements attributed to both gentlemen by the Division are inadmissible hearsay, and that the statements attributed to Rosas are double hearsay because they were translated by McCoy. Employer also questions McCoy's ability to accurately translate the statements made by Rosas. In addition, Employer asserts that Rosas' English skills were insufficient to allow him to counter the comments attributed to him by the Division's inspector. Finally, Employer contends that the Division should have relied on the testimony of the injured worker, which Employer represents "would have been a simple matter."

We agree with the ALJ's finding that the statements attributed to Rosas and/or McCoy are admissible as party admissions, an exception to the hearsay rule. Cal. Evidence Code section 1222(a). McCoy was a safety representative who was authorized by Employer to represent it and Rosas was a foreman with safety responsibility. Statements by either individual are imputed to Employer. *Sassan Geosciences, Inc.*, Cal/OSHA App. 05-2260, Denial of Petition for Reconsideration (Apr. 20, 2007), citing, *Macco Contractors, Inc.,* Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986).

With respect to McCoy's translation of the interview, the Division represented that McCoy volunteered for the task to ensure that Rosas correctly understood the questions.[5] Employer does not counter this assertion or suggest that McCoy was incapable of translating the interview between Rosas and the Division's inspector. Employer's reliance on the Board's rule of procedure regarding interpreters to challenge McCoy's translation is also misplaced. Board rule section 376.5 governs the use of interpreters in the Board's appeal proceedings; it does not pertain to the Division's investigative procedures. The ALJ properly applied the Board's procedure in this instance and precluded Rosas from testifying because an approved interpreter was not available at the hearing.

In addition, Employer offered no evidence to show that the accident did not occur as alleged by the Division, i.e., that the injured worker fell from an elevated surface over 7½ feet in height that lacked the requisite railing. Employer's decision not to challenge the Division inspector's account led the ALJ to credit the inspector's testimony. The ALJ's ruling on this issue was not improper.[6] As the ALJ noted, both Rosas and McCoy were present in the hearing room. Given Rosas' limited use of English, it is possible that he was unable to challenge statements attributed to him at the hearing, but no similar impediment barred McCoy from doing so. While McCoy testified at the hearing, Employer did not have him address the incident. Employer further declined to call other witnesses.

We find the Division's evidence sufficient to demonstrate a violation of section 1621(a) occurred, evidence that went largely unanswered by Employer. Although the evidence was circumstantial in nature, [7] the Board may rely on it.

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[5] The Division maintains this is, in part, why it did not know that a translator would be needed at the hearing; it did not know Rosas' English skills were so limited.

[6] When the Division provides evidence that an element of a violation on which it bears the burden of proof more likely than not occurred, and an employer does not present any evidence that the element did not occur or exist, it can be found the Division has met its burden as to such element. *Nibbelink Masonry Construction Co.*, Cal/OSHA App. 02-1399, Decision After Reconsideration (Dec. 20, 2007), citing, *Gaehwiler Construction Co.* Cal/OSHA App. 76-580, Decision After Reconsideration (Oct. 16, 1980).

[7] An element of a violation may be proven through circumstantial evidence. *Harbor Sand & Gravel, Inc.,* Cal/OSHA App. 01-1016, Decision After Reconsideration (June 5, 2003); *ARB, Inc.,* Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec. 22, 1997). The Board has repeatedly held that direct and circumstantial evidence, as well as reasonable inferences are to be considered in determining whether the preponderance of the evidence burden has been met. E.g., *Hensel Phelps Construction Co.*, Cal/OSHA App.

This is especially true when the Division credibly represents, as it did here, that its attempts to locate the only percipient witness, the injured worker, were unsuccessful, a fact Employer disregards in protesting the Division's lack of reliance on the injured worker's testimony. In sum, we find the preponderance of the evidence demonstrates that the alleged violation occurred.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ's decision and the assessment of civil penalties in the amount of $1,375.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member

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01-1618, Decision After Reconsideration (Jul. 6, 2007); *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Nov. 2, 2007).